

SEC Issues Guidance for Disclosing Material Climate Change Risks

On January 27, 2010, the United States Securities and Exchange Commission (“SEC”) voted 3-2 (along party lines) to issue an Interpretive Release (“Release”) intended to clarify existing disclosure requirements as they apply to “business or legal developments relating to the issue of climate change.” The Release has yet to be published, but when it is, will be posted at <http://www.sec.gov/rules/interp.shtml>.

The Release is not a new rule or regulation. The Release will interpret how climate change risks should be addressed under existing SEC Regulation S-K—which prescribes areas of disclosure for registration statements and periodic reporting filed under the Securities Acts of 1933 and 1934.

BACKGROUND

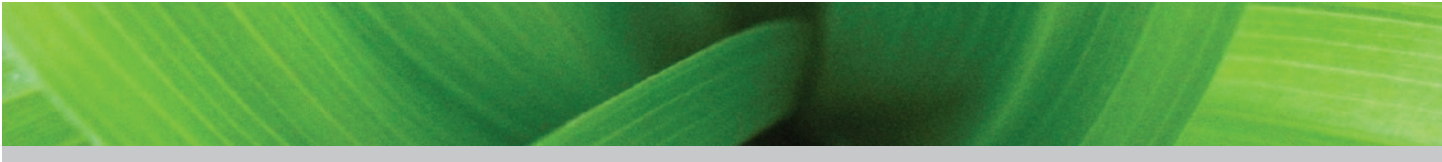
The Release will offer guidance for complying with Regulation S-K, particularly with respect to disclosures of material risks that may reasonably impact a company’s business description (Item 101), legal proceedings (Item 103), and management discussion and analysis (Item 303). SEC Chairman Mary Schapiro’s stated objectives for the Interpretive Release are to establish more “consistency” and “clarity” as to what constitutes a “material” risk in the context of climate change. Chairman Schapiro’s statement can be found at <http://www.sec.gov/news/press/2010/2010-15.htm>.

While the announcement made clear that the SEC was “not opining on whether the world’s climate is changing, at what pace it might be changing, or due to what cause,” the Release is an implicit statement by the SEC that climate change, and laws and policies aimed at addressing climate change, present material risks or opportunities to many corporations. The risks range from the physical impacts of climate change itself (e.g., water supply constraints, rising sea levels, and increased hurricane risks), to the impact current or looming carbon emission controls may have on business operations, capital expenditures and liabilities.

SEC Interpretive Releases are relatively infrequent—only 22 have been issued since 2000. A group of large institutional investors, including state pension fund managers, the investor-based climate advocacy group Ceres, and state treasurers and attorneys general from 11 states (CA, FL, KY, ME, MD, NJ, NY, NC, OR, RI, and VT) have been pressuring the SEC to take action, including submitting a 2007 petition to the SEC to issue an Interpretive Release. The petition can be found at <http://www.ceres.org/Page.aspx?pid=445>.

CLIMATE RISKS ADDRESSED BY THE INTERPRETIVE RELEASE

SEC’s announcement cites four climate change risks that public companies must now consider and possibly disclose under the new guidance.



(1) Impact of Legislation and Regulation. Companies will have to consider whether the impact of existing climate laws and regulations are material, and in “certain circumstances,” whether “pending” laws and regulations are also material. The materiality of pending regulations and laws could be a matter of contention given the uncertainties about the future of both federal agency rulemakings and legislation, and also state initiatives.

(2) Impact of International Accords. Companies will be required to consider, and disclose when material, business impacts of “international accords and treaties relating to climate change.” Here, as well, the uncertainties surrounding the future of the Kyoto Protocol and the Copenhagen Accord could complicate disclosures.

(3) Indirect Consequences of Regulation or Business Trends. Legal, technological, political and scientific developments regarding climate change may create new opportunities or risks for companies. Demand for carbon-intensive goods may go down and the cost of certain equipment, fuels and material may increase. SEC thus will require disclosure of “actual or potential indirect consequences [a company] may face” from climate change laws or policies.

(4) Physical Impacts of Climate Change. Companies will be required to evaluate the “actual and potential material impacts of environmental matters” on their business.

Again, the ultimate guidelines may provide more detail about the expectations that the SEC has for disclosures, and in particular, how it believes public companies should address areas for which there are significant uncertainties.

FOR ADDITIONAL INFORMATION

Van Ness Feldman closely monitors congressional and executive branch developments on climate change and energy policy, and is in a strong position to provide expert analysis and advice on emerging legislation and regulatory activity, the surrounding policy and political debate, and the implications for your organization. If you would like more information about these climate risk disclosure guidelines or assistance with assessing such risks, please contact Kyle Danish, Doug Smith, Stephen Fotis, or any member of the firm’s Climate Change practice at (202) 298-1800. Those interested in on-going coverage of climate change policy developments may wish to subscribe to the weekly Climate Change Policy Update at <http://www.vnf.com/news-signup.html>.

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